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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 463

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

WYMAN-GORDON COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals (A. 109–118) is reported at 397 F. 2d 394. The opinion of the district court (A. 101–106) is reported at 270 F. Supp. 280. The decision of the Board's Regional Director, out of which the instant case arose (A. 9–11, 29–34), is not officially reported.

JURISDICTION

The judgment of the court of appeals was entered on June 12, 1968 (A. 119). The petition for a writ of certiorari was filed on August 30, 1968, and was granted on November 12, 1968 (A. 120). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*), and of the Administrative Procedure Act, as amended (60 Stat. 237, 80 Stat. 381, 81 Stat. 54, 5 U.S.C. 551 *et seq.*), are set forth in Appendix A, *infra*, pp. 55–60.

QUESTIONS PRESENTED

1. Whether the requirement that employers must furnish the National Labor Relations Board with the names and addresses of the employees eligible to vote in a representation election—information which the Board makes available to the contestants in the election—is invalid because the agency promulgated it in an adjudicatory proceeding rather than under the rule-making procedures of the Administrative Procedure Act, and made it applicable only prospectively.

2. If the first question is answered negatively, whether, where an employer refuses to furnish such information, the Board may compel its production through an appropriate proceeding—either to enforce a Board subpoena or for injunctive relief—in a federal district court.

STATEMENT

In *Excelsior Underwear Inc.*, 156 NLRB 1236 (1966),[1] a representation proceeding under Section 9(c) of the Act, the Board decided that, in order to provide the broadest possible access of contestants to the employee electorate and to facilitate the resolution of voter eligibility questions, an employer would

[1] The Board's opinion in *Excelsior* is set forth at A. 12–28.

be required to file with the Board's Regional Director, prior to the conducting of a representation election, a list of the names and addresses of the employees eligible to vote therein, and that the Regional Director would then make the list available to all parties to the proceeding.[2] However, "to insure that all parties to forthcoming representation elections are fully aware of their rights and obligations as here stated," the Board further decided that the new requirement would not be applied in that case, but would be applicable only to elections directed, or consented to, 30 days thereafter (A. 17, n. 5, 27). The instant case, the election in which was directed seven months after the *Excelsior* decision, grows out of respondent Company's refusal to comply with that requirement.

On July 12, 1966, the International Brotherhood of Boilermakers filed a petition, pursuant to Section 9(c)(1) of the Act, seeking to represent the Company's employees at its plants in Worcester, North Grafton, and Millbury, Massachusetts (A. 4, 8). Subsequently, another labor organization, the United Steelworkers of America, intervened in the representation proceeding, competing for the employees' support (A. 4). After investigation and hearing, the

[2] The unions involved in *Excelsior*, and in a companion case (*Kellogg*) which was consolidated with it, had filed objections to the elections on the ground, *inter alia*, that the employers' refusal to furnish a list of the names and addresses of the employee-voters had deprived them of an adequate opportunity to counter misleading campaign literature promulgated by the employers (A. 13, 14).

Before reaching its decision in *Excelsior*, the Board obtained the views of leading employer and union groups, which filed briefs and presented oral argument as *amici curiae* (A. 15).

Board's Regional Director directed that an election be held in a unit consisting of the approximately 1750 production and maintenance employees at the three plants (A. 4, 10, 30). The Regional Director further directed the Company to furnish, prior to the election, a list of the names and addresses of the eligible voters, as required by the Board's *Excelsior* decision, so that the list could be made available to the parties involved (A. 11, n. 3).

The Company notified the Regional Director that it would not furnish such a list; the election was held without it, and both of the Unions lost (A. 29–30, 32). The Unions filed objections to the election based on the Company's refusal to furnish the list (A. 30). The Regional Director upheld the Unions' objections, set aside the first election, and directed that another election be held; the Board sustained this action (A. 31–35).[3] The Regional Director again directed the Company to furnish an employee list to the Unions (A. 36–37).

When the Company again refused, the Regional Director, pursuant to Section 11(1) of the Act, issued a subpoena *duces tecum* requiring the Company to produce its books and records showing the names and addresses of the employees eligible to vote in the election, or, in lieu thereof, a list containing that information (A. 38–39). The Company moved to quash the

[3] In rejecting the Company's arguments, the Board noted that "it is well known that *Excelsior* issued only after oral argument and briefs, including *amicus curiae* briefs by interested parties," and that it had "considered arguments such as those made here * * *" (A. 33).

subpoena; the Board denied the motion (A. 40–42). When the Company still refused to comply with the subpoena, the Board brought an action in the United States District Court for the District of Massachusetts to enforce the subpoena, or, alternatively, for a mandatory injunction directing the Company to comply with the *Excelsior* requirement (A. 3–7).

The district court found that the *Excelsior* requirement was a valid exercise of the Board's statutory authority and was properly promulgated in an adjudicatory rather than a rule-making proceeding, and accordingly enforced the subpoena (A. 101–106). However, the court of appeals (with Judge Coffin dissenting) reversed. That court characterized the *Excelsior* requirement as one "to which we see little or no objection and for which there is much to be said" (A. 112), and stated that it was "not * * * greatly impressed with the arguments challenging the wisdom of the *Excelsior* rule" (A. 110). Nonetheless, it held the employee-list requirement invalid because it was not promulgated in accordance with the requirements prescribed for rulemaking procedings in Section 4 of the Administrative Procedure Act (5 U.S.C. 553), and had been made prospective only in effect (A. 111–113). The court below further concluded that the *Excelsior* rule was not simply "procedural", as distinguished from "substantive", in nature (A. 113), thereby rejecting Judge Coffin's analysis pursuant to which Section 4 of the Administrative Procedure Act was by its terms inapplicable (see A. 114).

ARGUMENT

INTRODUCTION AND SUMMARY

In *Excelsior Underwear Inc.*, 156 NLRB 1236, the Board in 1966 decided (1) that an employer would be required to furnish the Regional Director, prior to the conducting of a representation election, the names and addresses of the eligible voters, which list would then be made available to all contestants in the election, and (2) that this requirement would apply only prospectively, to all elections directed or consented to subsequent to 30 days after the date of its decision there. The court below, although it did not reach the merits of the *Excelsior* requirement, strongly intimated its probable approval thereof (A. 110, 112; see *supra*, p. 5). Moreover, the five other courts of appeals which have considered the matter have upheld the propriety of the *Excelsior* requirement, and the Board's authority to impose it. *National Labor Relations Board* v. *Hanes Hosiery Division*, 384 F. 2d 188 (C.A. 4), certiorari denied, 390 U.S. 950; *National Labor Relations Board* v. *Rohlen*, 385 F. 2d 52 (C.A. 7); *Howell Refining Co.* v. *National Labor Relations Board*, 400 F. 2d 213, 216 (C.A. 5); *National Labor Relations Board* v. *Beech-Nut Life Savers, Inc.*, 69 LRRM 2846 (C.A. 2); *British Auto Parts, Inc.* v. *National Labor Relations Board*, No. 21, 883 (C.A. 9), decided December 17, 1968.[4] However, since we anticipate that re-

[4] For the Court's convenience, the opinion of the Second Circuit in *Beech-Nut*, and that of the Ninth Circuit in *British Auto Parts*, neither of which is yet officially reported, are reprinted, respectively, in Appendix B, *infra*, pp. 61–72, and Appendix C, *infra*, pp. 73–77.

spondent Company will seek to sustain the judgment of the court below on the alternative ground that the *Excelsior* requirement is in any event beyond the Board's statutory authority, whatever the propriety of the manner in which it was adopted, we show in Point II (*infra*, pp. 35–40) that the requirement is one which the Board could lawfully prescribe.[5]

Despite indicating that it would probably view the rule as substantively valid, the court below declined to uphold the *Excelsior* requirement simply because, in its view, the Board had followed an improper procedure in adopting it—*i.e.*, it enunciated the requirement in an adjudicatory proceeding instead of pursuant to the rule-making procedures specified in Section 4 of the Administrative Procedure Act (5 U.S.C. 553), and impermissibly made the requirement prospective in operation. We show in Point I (*infra*, pp. 9–34) that the view of the court below is an

[5] Respondent Company filed a brief in response to the Board's petition for certiorari in the instant case which appears to acquiesce in the granting of that petition (see Resp. Br., p. 33). That document was also termed a cross-petition for a writ of certiorari, and was docketed as No. 578, this Term. Respondent sought to raise essentially the same issues which the Board's petition presented, but also urged, *inter alia*, that the Court review the substantive validity of the *Excelsior* requirement. In opposing the cross-petition, on the ground, among others, that it was not timely filed, the Board noted that, were certiorari granted in the instant case, the Company could argue, as an alternative ground for upholding the judgment of the court of appeals, that the *Excelsior* rule was at all events invalid. Certiorari was denied in No. 578 on November 12, 1968, the same date on which certiorari was granted in the instant case.

erroneous one[*] because (1) the Board has discretionary authority to establish a rule such as the *Excelsior* requirement in an adjudicatory proceeding, under *Securities & Exchange Commission* v. *Chenery*, 332 U.S. 194, and to apply that requirement only prospectively in the interests of fairness and sound administration, and (2) Section 4 of the Administrative Procedure Act was inapplicable, in any event, since the *Excelsior* requirement involves a procedural, rather than a substantive rule.

Finally, we show in Point III (*infra*, pp. 40–53) that, where, as here, an employer refuses to furnish the information required by *Excelsior*, the Board may compel its production through an appropriate proceeding in a federal district court—either by enforcement of its subpoena or the issuance of a mandatory injunction.

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[*] Three circuits have expressly disapproved the view of the Court below, *viz.*, the Second Circuit in *Beech-Nut*, *supra* (App. B, pp. 66–68), the Fifth Circuit in *Howell*, *supra*, 400 F. 2d at 216, n. 8, and the Ninth Circuit in *British Auto Parts*, *supra* (App. C, pp. 74–76). Indeed, both the Second and Ninth Circuits discussed at length and then rejected entirely the premises on which the First Circuit's decision in the instant case were based (see *infra*, pp. 16–19, and note 15).

I. THE BOARD'S *EXCELSIOR* REQUIREMENT WAS VALIDLY PROMULGATED EVEN THOUGH THE RULE-MAKING PROCEDURES OF THE ADMINISTRATIVE PROCEDURE ACT WERE NOT UTILIZED

A. THE BOARD HAD DISCRETION TO FORMULATE SUCH A REQUIREMENT IN EITHER AN ADJUDICATORY OF A RULE-MAKING PROCEEDING; ITS CHOICE OF THE FORMER WAS NOT RENDERED INAPPROPRIATE MERELY BECAUSE IT APPLIED THE REQUIREMENT PROSPECTIVELY

The broad discretion of an administrative agency to choose the means by which it formulates policy was established in this Court's landmark decision in *Securities & Exchange Commission* v. *Chenery Corporation,* 332 U.S. 194. The Court there upheld a new standard promulgated by the Securities and Exchange Commission in an adjudicatory proceeding under the Public Utility Holding Company Act. In effect, the Commission's standard, as applied to that case and to future cases, prevented management from realizing a profit on trading in the securities of a company during its reorganization. The Court there rejected the contention that the Commission was precluded from announcing and applying a new principle in an adjudicatory proceeding and that it could only "promulgate a general rule outlawing such profits in future utility reorganizations" (*id.* at 199–200). It pointed out (*id.* at 202) that "any rigid requirement" that the agency was compelled to perform "[t]he function of filling in the interstices of the Act * * * through this quasi-legislative promulgation of rules to be applied in the future * * * would make the ad-

ministrative procedures inflexible and incapable of dealing with many of the specialized problems which arise"; and that, since "the agency must retain power to deal with the problems on a case-by-case basis if the administrative procedure is to be effective, [t]here is thus a very definite place for the case-by-case evolution of statutory standards" (*id.* at 203). The Court concluded that "the choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency" (*ibid.*). See also *California* v. *Lo-Vaca Gathering Co.*, 379 U.S. 366, 371; *Columbia Broadcasting System* v. *United States*, 316 U.S. 407, 421.

The Administrative Procedure Act does not curtail an agency's general discretion to proceed by either ajudication or rule making. That Act prescribes two sets of procedures for agency action: one applicable to administrative "rule making"; the other, to administrative "adjudication."[7] The Act does not, however,

[7] The Administrative Procedure Act specifies the following steps for "rule making": (1) general notice of the proposed rule making must be published in the Federal Register, unless persons subject thereto have been served or have actual notice; (2) interested persons must be given an opportunity to submit their views on the proposed rule; and (3) after consideration of the relevant matter presented, the agency must incorporate in the rules "a concise general statement of their basis and purpose" and publish them in the Federal Register at least 30 days before their effective date (5 U.S.C. 552, 553). The procedure for "adjudication," where applicable, provides for the typical adversary proceeding—notice of the issues, responsive pleading, hearing, and decision (5 U.S.C. 554, 556, 557). Interpretive rules, procedural rules, and general statements of policy are

purport to compel an agency to utilize one procedure or the other. Nor does it even clearly indicate when one or the other would be appropriate, for the definitions of "rule making" and "adjudication" are in general terms and are not mutually exclusive.[8] The legislative history is equally obscure, merely indicating that, in a general way, Congress intended the rule-making procedures to be applicable when the agency was acting as a "legislature," and the adjudication procedures to be applicable when it was acting as a "court."[9]

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exempted from the rule-making procedures (5 U.S.C. 553(b)(3)(A) and (d)); proceedings for the certification of employee representatives are exempted from the adjudicatory procedures (5 U.S.C. 554(a)(6), 556(a), 557(a)), and are thus subject only to the requirements of Section 9(c) of the National Labor Relations Act.

[8] "Rule making" is defined as "agency process for formulating, amending, or repealing a rule," and "rule" as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy * * *" (5 U.S.C. 551(5) and (4)). "Adjudication" is defined as "agency process for the formulation of an order," and "order" as "the whole or a part of a final disposition, whether affirmative, negative, injunctive or declaratory in form, of an agency in a matter other than rule making but including licensing" (5 U.S.C. 551(7), (6)).

[9] Commenting on the statutory definitions (see note 8, *supra*), Representative Walter, one of the sponsors of the bill, stated (92 Cong. Rec. 5649 (Leg. Hist. of the APA, p. 355)): "In this bill the accepted analytical terminology has been adopted. Accordingly, we speak of rule or rule making whenever agencies are exercising legislative powers. We speak of orders and adjudications when they are doing things which courts otherwise do." Similarly, the House report asserts (H. Rep. No. 1980, 79th Cong., 2d Sess., p. 17 (Leg. Hist. of the APA, p. 251)): "In stating the essentials of the different forms of administrative proceedings, the bill carefully distinguishes

Applying the principles of *Chenery* and upon analysis of the provisions of the Administrative Procedure Act, the courts of appeals have repeatedly recognized the Labor Board's discretionary authority to establish new policies and principles through decision in particular cases rather than by promulgation of formal rules.[10] For example, in *National Labor Relations Board* v. *A.P.W. Products Co.*, 316 F. 2d 899, the Second Circuit sustained the Board's action in enunciating, in an adjudicatory proceeding, a reversal of its prior practice of tolling back pay for the period between the Trial Examiner's proposed dismissal of

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between the so-called legislative functions of administrative agencies (where they issue general regulations) and their judicial functions (in which they determine rights or liabilities in particular cases). It provides quite different procedures for the 'legislative' and 'judicial' functions of administrative agencies. In the 'rule making' (that is 'legislative') function it provides * * * [and] in 'adjudications' (that is, the 'judicial' function) * * *."

See also 1 Davis, *Administrative Law Treatise*, pp. 287–288, 294, 298, Secs. 5.01, 5.02 (1958): "These various difficulties [of differentiating between adjudication and rule making] are avoided by saying simply that adjudication resembles what courts do in deciding cases, and that rule making resembles what legislatures do in enacting statutes. Then particular problems of classification can be resolved by keeping an eye on the consequences of the particular classification. * * * The meaning of such a term as 'rule' must frequently depend not only upon word contexts but also upon practical contexts. * * * Except when the meaning of authoritative words is beyond dispute, the choice of labels should depend largely upon judgments concerning practical results."

[10] Section 6 of the National Labor Relations Act empowers the Board "to make * * *, in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of this Act."

an unfair labor practice charge and the Board's decision to the contrary. The court pointed out (316 F. 2d at 905):

> * * * [M]uch can be and has been said in favor of an agency's invoking the rule-making procedure when it wants to make rules. * * * But our question is not of wisdom but of authority. Congress cannot have been blind to the fact that the adjudicative process of the agencies, like that of the courts, gives birth to "rules," which may apply for the past, for the future, or, more generally, for both. * * * The short of it would seem to be that when an administrative agency makes law as a legislature would, it must follow the rule-making procedure prescribed in § 4 [5 U.S.C. 553], and when it makes law as a court would, it must follow the adjudicative procedure, prescribed in §§ 5, 7 and 8 [5 U.S.C. 554, 556, 557]; whether to use one method of law making or the other is a question of judgment, not of power. * * *

To like effect, see *National Labor Relations Board* v. *Penn Cork & Closures, Inc.*, 376 F. 2d 52, 57 (C.A. 2), certiorari denied *sub nom. District Lodge No. 15* v. *National Labor Relations Board*, 389 U.S. 843; *National Labor Relations Board* v. *E & B Brewing Co.*, 276 F. 2d 594, 598 (C.A. 6), certiorari denied, 366 U.S. 908; *National Labor Relations Board* v. *Pittsburgh Plate Glass Co.*, 270 F. 2d 167, 174 (C.A. 4), certiorari denied, 361 U.S. 943; *Optical Workers' Union Local 24859* v. *National Labor Relations Board*, 227 F. 2d 687, 691 (C.A. 5), certiorari denied, 351 U.S. 963; *National Labor Relations Board* v. *Local 182, Teamsters*, 401 F. 2d 509, 510 (C.A. 2). See also Shapiro, *The Choice of Rulemaking or Adjudication in the De-*

velopment of Administrative Policy, 78 Harv. L. Rev. 921, 926–927 (1965).[11] Indeed, in recognition of the fact that the Board has power to promulgate new standards or policies either through the decisional process or through rule-making procedures, Section 14(c)(1), which was added to the Act in 1959, specifically provides that the Board can decline to assert jurisdiction over certain classes or categories of employees either "by rule of decision or by published rules adopted pursuant to the Administrative Procedure Act."

The Board has historically formulated substantive principles and requirements only through the decisional process, and has not as yet used its rule-making authority under Section 6 (see note 10, *supra*) for that purpose. That approach has stemmed from the

[11] This Court has often approved "rules" articulated by the Board in the adjudication of particular cases, without questioning the propriety of that procedure. See, *e.g.*, *Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U.S. 793, 802–803, nn. 8 and 9; *National Labor Relations Board* v. *A. J. Tower Co.*, 329 U.S. 324, 329–335; *National Labor Relations Board* v. *Seven-Up Bottling Co.*, 344 U.S. 344; *Brooks* v. *National Labor Relations Board*, 348 U.S. 96, 98–99, 101–102, nn. 9 and 10, 104. Additional instances of the Board's adoption of new policies through adjudication are cited in Friendly, *The Federal Administrative Agencies*, pp. 36–52 (1962), and *National Labor Relations Board* v. *Lorben Corp.*, 345 F. 2d 346, 349–350 (C.A. 2) (dissenting opinion). And see Shapiro, *supra*, 78 Harv. L. Rev. at 926: "Agencies, like courts, frequently evolve detailed and precise rules in the course of adjudication. Indeed, it is worth noting that in Judge Friendly's lectures on the need for better definition of standards, his examples of successful formulation are taken from instances of adjudication [citing Friendly, *supra*, at 27–45]."

Board's judgment that formal rule-making procedures are, as a general matter, too rigid and inflexible for most of the problems with which it is concerned. As the Board has explained, in such complex areas, for example, as secondary boycotts, picketing, the duty to bargain in good faith, and restraint of employees in the exercise of their Section 7 rights, regulation is ordinarily better accomplished through case-by-case adjudication, which permits "gradual development of the law through specific factual patterns * * * [that] emerge from actual industrial experience"; also, the cumbersome process of amending formal rules would impede "the law's ability to respond quickly and accurately to changing industrial practices."[12]

Moreover, and quite significantly, unlike some other administrative agencies, the Board itself cannot initiate its own processes. Rather, its ability to act on a particular matter depends, in the first instance, on the filing of an unfair labor practice charge or a petition in a representation case by an outside party. Lacking independent authority to investigate or over-

[12] Supplemental Memorandum of the National Labor Relations Board to the Subcommittee on the Separation of Powers of the Senate Judiciary Commitee, October 21, 1968, 69 LRRM 159. See also McCulloch, *Procedures Employed by NLRB in Determining Policy*, Speech to the Administrative Law Section of the American Bar Association, August 11, 1964, 56 LRRM 31. Cf. *Administrative Procedures in Government Agencies*, Final Report of the Attorney General's Committee on Administrative Procedure, S. Doc. No. 8, 77th Cong., 1st Sess., p. 98, n. 18.

see the industrial scene generally,[13] the Board frequently becomes aware of a given problem in an area subject to its jurisdiction only when it is raised in the context of a particular case. Thus, the bulk of the Board's experience has been accumulated through the adjudication of issues brought to it by outside parties. Understandably, it has therefore become accustomed to following the practice of evolving substantive rules in adjudicatory proceedings, which, as already noted, has many real practical advantages.[14]

In the light of this background, and since the question of furnishing the employee names and addresses was first raised as an issue in the *Excelsior* case itself (see *infra*, pp. 18–19), the Board did not abuse its discretion in promulgating the requirement in a decision rather than in a formal rule-making proceeding. Accordingly, the Second Circuit in the *Beech-Nut* case, while recognizing that the *Excelsior* requirement was a rule of general applicability and future effect, properly concluded that "[t]he Board can resolve a problem * * * either by quasi-legislative promulgation of general rules designed to meet the problem * * * or in quasi-judicial proceedings when the

[13] Congress' unwillingness to grant the Board such powers is reflected in Section 4(a) of the Act, which precludes the Board from appointing "individuals for the purpose of conciliation, or mediation, or for economic analysis."

[14] The Board has indicated, however, that, in "response to constructive suggestions from judges, students of the law and practitioners," it will give "renewed and full consideration to the wisdom and practicability of substantive rule-making in its administration of the law." Supplemental Memorandum, *supra*, p. 160.

problem arises as an issue in a case before the Board * * * [and that whichever] procedure it chooses to follow in resolving any particular problem is a matter for the Board, in its informed judgment, to decide" (App. B, p. 65). A like approach should have been followed here by the First Circuit.

Indeed the court below expressly acknowledged the Board's authority to promulgate new standards or principles in adjudicatory proceedings, provided they are given effect for the past as well as for the future. It took no issue with the adoption of the employee-list requirement by decision rather than formal rule, and intimated that it thought the requirement a substantively valid one. Nonetheless, on the narrow ground that the Board in *Excelsior* determined to give the requirement there adopted prospective effect only, the court below concluded that the Board's action lost the attributes of adjudication and thus was unlawful. It distinguished *Chenery* on the ground that there the Commission had made the new rule applicable to the parties in that case, whereas in *Excelsior* the Board "did not decide a case between party and party, or more exactly, it decided a case one way, and took occasion to lay down a future rule the other way" (A. 112).

In short, the court apparently would have approved the *Excelsior* requirement had the Board applied it to invalidate the elections involved in that case. But, in the court's view, when the Board failed so to apply the requirement, its action could no longer be deemed an adjudication or the decision of "a case

between party and party." Rather, in its view, it became a quasi-legislative rule that could lawfully be promulgated only in a rule-making proceeding under Section 4 of the Administrative Procedure Act. That narrow ground on which the decision below rests is demonstrably erroneous.

1. Contrary to the court below, the Board in *Excelsior* performed the normal adjudicatory function of deciding a particular controversy between the parties to that case. It was there asked to determine the validity of two representation elections whose fairness was put in issue by objections of the petitioning unions, based on the employers' pre-election refusal to make available to the unions the names and addresses of the employees eligible to vote (*supra*, pp. 2–3; see A. 13–14). In the course of determining that issue, the Board decided to consider the broader question whether the fairness of its election procedures generally would be enhanced by a requirement that all employers file such a list prior to the holding of a representation election, and therefore obtained the views on that matter not only of the parties to the particular proceeding, but of other interested groups as well (A. 14–15). Based upon a consideration of all the information so obtained, the Board decided that its election procedures would be improved by imposing such a requirement on employers generally, but that, out of considerations of fairness to the particular employer there involved, the requirement should only be applied prospectively. Accordingly, after fully articulating the basis for its decision (A. 17–26), it overruled the objections to the elections

conducted in the *Excelsior* case (A. 27). As the Second Circuit concluded in *Beech-Nut,* in these circumstances "[c]learly the rule announced in *Excelsior* was substantially based on the facts and issues of that case" (App. B, p. 67).[15]

This conclusion is not undermined because "the new rule extended beyond the immediate facts of the *Excelsior* case and was designed to be applicable to all future representation elections" (*ibid.*). "[T]he Board in devising a rule is not limited to the particular facts of the case presented to it for adjudication," but is entitled "to bring all its accumulated knowledge and experience to bear on any problem before announcing a rule designed to deal with that problem" (*id.* at 67–68). Similarly, in *National Labor Relations Board* v. *Seven-Up Bottling Co.*, 344 U.S. 344, after noting that "[i]t is the business of the Board to give coordinated effect to the policies of the Act" (*id.* at 348), this Court noted that regulatory "competence could not be exercised if in fashioning remedies the administrative agency were restricted to considering only what was before it in a single proceeding" (*id.* at 349). See also *Phelps Dodge*

[15] As the Second Circuit added, this is not a case where a "rule [has] been tacked onto an opinion dealing with completely unrelated facts and issues" (App. B, p. 67). Similarly, as the Ninth Circuit noted in *British Auto Parts*, the employee-list requirement "was a salient issue in the *Excelsior* controversy," and thus "manifestly constituted a matter that the Board was entitled to consider, rule upon, and resolve" in that proceeding (App. C, p. 75). That court concluded that the Board's action in *Excelsior* "constituted finding, conclusion and order resting on decisional element and incident in the controversy before it and so inherently represented adjudicative process and result" (*ibid.*).

Corp. v. *National Labor Relations Board*, 313 U.S. 177, 194.

2. There is nothing in the definition or concept of "adjudication" which would justify the distinction drawn by the court below. As noted previously (see note 8, *supra*), the Administrative Procedure Act defines "adjudication" as "agency process for the formulation of an order" (5 U.S.C. 551(7)). "Order," in turn, is defined as "the whole or a final disposition, whether affirmative, negative, injunctive, or declaratory in form * * *" (5 U.S.C. 551(6)). The representation proceeding in *Excelsior*, wherein the Board had to, and did, consider the objection by the unions that the elections should be set aside because of the employer's failure to furnish the names and addresses of the eligible voters, was "agency process for the formulation of an order." The Board's decision to overrule those objections and to certify the election results, showing that the unions had failed to obtain a majority of the votes (A. 27–28), was plainly "a final disposition * * * of an agency matter," or an "order." Thus, the literal requirements of the Administrative Procedure Act were complied with in *Excelsior*. Nothing in the language of that Act requires that a general principle formulated in an adjudicatory proceeding must be applied forthwith to the parties thereto, instead of only prospectively.

Moreover, although principles evolved through adjudication usually are applied both to the immediate parties as well as prospectively, there is nothing in the nature of the adjudicatory process or in pertinent judicial precedents which requires this result. On the

contrary, as Judge (later Chief Justice) Vinson stated in *Warring* v. *Colpoys*, 122 F. 2d 642, 645 (C.A. D.C.), certiorari denied, 314 U.S. 678:

> Traditionally, he who questioned the law or the best evidence of it is given the benefit of the new law or the best evidence of it. This is not always the case. There has arisen, for example, when contract rights or property rights growing out of contracts are involved, the exception that the one who argued against the established law is not given the benefit of the change he helped bring about inasmuch as his adversary relied upon the previous law. Such decisions apply the old law to the case at hand while establishing the new law for the future. The Supreme Court has found no constitutional limitation on state courts proceeding in this manner. Federal courts have proceeded similarly. * * *

Indeed, the development by this Court in recent years of a doctrine of complete or partial non-retroactivity of constitutional decisions involving rules of criminal procedure argues strongly that an administrative agency, acting in a quasi-judicial capacity, should have at least similar flexibility in regard to non-criminal matters within its jurisdiction. *E.g.*, *Linkletter* v. *Walker*, 381 U.S. 618; *Tehan* v. *Shott*, 382 U.S. 406; *Johnson* v. *New Jersey*, 384 U.S. 719; *Stovall* v. *Denno*, 388 U.S. 293.[16] We recognize that the Court stopped short, in *Stovall*, of adopting a rule of complete prospectivity. That, however, was viewed as "an unavoidable consequence of the ne-

[16] See also *DeStefano* v. *Woods*, 392 U.S. 631; *Fuller* v. *Alaska*, No. 249, this Term, decided October 28, 1968.

cessity that constitutional adjudications not stand as mere dictum" (388 U.S. at 301). In the administrative context, on the other hand, at least where the issues involved are not constitutional, there is no need to take into account those "[s]ound policies of decisionmaking, rooted in the command of Article III of the Constitution" which the Court in *Stovall* found argued against wholly prospective application of the new rule it had there adopted (*ibid.*). Administrative agencies of course exercise Article I and not Article III powers, even when acting in a quasi-judicial capacity. And neither this Court (*e.g., England* v. *Louisiana State Board of Medical Examiners*, 375 U.S. 411)[17] nor the State courts (*e.g., O'Brien* v. *Atlas Finance Co.*, 223 Ark. 176, 264 S.W. 2d 839)[18] have been reluctant, in non-constitutional cases, to announce new rules which are to be entirely prospective in operation.

Considerations of fairness to the parties to an adjudicatory proceeding often militate against applying a newly fashioned rule to them, since they obviously had

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[17] As noted in *Johnson*, the Court had, prior to *Linkletter*, "applied new judicial standards in a wholly prospective manner" (384 U.S. at 733). See also *Great Northern Ry. Co.* v. *Sunburst Oil & Refining Co.*, 287 U.S. 358, where the Court noted that "the federal constitution has no voice upon the subject" of retroactivity versus prospectivity of judicial decisions (*id.* at 364), since a State is free to "make a choice for itself between the principle of forward operation and that of relation backward" (*ibid.*). Lower federal courts have proceeded in a similar fashion. See, *e.g., United States* v. *Youngblood*, 379 F. 2d 365, 370 (C.A. 2).

[18] See Note, *Stare Decisis—Use of the Caveat Device to Announce New Rule of Law Prospectively*, 28 Temp. L.Q. 296 (1954).

no opportunity in their prior conduct to comply therewith. This is particularly so where the new rule does not involve a question of first impression, but rather a change in existing law. That was of course the precise situation involved in the *Excelsior* case, for employers had not previously been required to provide lists of employee names and addresses in connection with representation proceedings. Indeed, the approach taken by the Board there closely parallels the result reached by this Court, and for similar reasons, in *James* v. *United States*, 366 U.S. 213, where the holding that taxable income included embezzled funds was not applied to the defendant there involved (see *id.* at 221–222).[19]

Moreover, administrative agencies ordinarily are intended to be even more flexible in operation than courts. Thus, such agencies consistently have been held to have the authority to apply new principles formulated in adjudicatory proceedings in a prospective manner only. It has been so held not only with respect to other administrative agencies (see *City of Chicago* v. *Federal Power Commission*, 385 F. 2d 629,

[19] Cf. Comment, *Prospective Overruling and Retroactive Applications in the Federal Courts*, 71 Yale L. J. 907 (1962). This comment suggests that federal courts are precluded from announcing rules which operate prospectively only by the provisions of Article III of the Constitution (*id.* at 930–931) (see *Stovall* v. *Denno*, 388 U.S. at 301, discussed *supra*, pp. 21–22). However, as shown above, the federal courts have not consistently agreed with this analysis, at least in regard to non-constitutional matters. Moreover, the comment acknowledges that State courts are in any event not so restricted (*id.* at 933). Similarly, federal courts and agencies established under Article I of the Constitution, such as the Board, would not be so limited. See *Ex parte Bakelite Corp.*, 279 U.S. 438, 449–451.

642–643 (C.A. D.C.); *Safarik* v. *Udall*, 304 F. 2d 944, 948–950 (C.A. D.C.), certiorari denied, *sub nom. Hansen* v. *Udall*, 371 U.S. 901), but also with respect to the Board itself. See *National Labor Relations Board* v. *A.P.W. Products Co.*, 316 F. 2d 899, 905–906 (C.A. 2); *Leedom* v. *International Brotherhood of Electrical Workers*, 278 F. 2d 237, 239–241 (C.A. D.C.); *Optical Workers' Union Local 24859* v. *National Labor Relations Board*, 227 F. 2d 687, 691 (C.A. 5), certiorari denied, 351 U.S. 963; *National Labor Relations Board* v. *Majestic Weaving Co.*, 355 F. 2d 854, 860 (C.A. 2). See also Shapiro, *supra*, 78 Harv. L. Rev. at 933–935, 955–957; 1 Davis, *supra*, pp. 351–352, Sec. 5.09.

In short, nothing in either the National Labor Relations Act or the Administrative Procedure Act purports to prevent the Board from determining in its discretion that a principle established in an adjudicatory proceeding should be applied only prospectively. To the contrary, the precedents and considerations of sound administration combine to support strongly the sort of flexibility exercised by the Board in *Excelsior*.

Indeed, the fact that the Board, unlike the Commission in *Chenery*, did not apply its newly announced rule to the parties in *Excelsior* makes that case an even stronger one than *Chenery* for upholding the agency's authority to announce such a principle in an

adjudicatory proceeding.[20] The real controversy surrounding *Chenery*, and in this area of administrative law generally, is whether considerations of procedural fairness preclude an agency from applying a new adjudicatory standard retroactively to conduct occurring prior to its announcement. See *Chenery*, *supra*, 332 U.S. at 203; *National Labor Relations Board* v. *Guy F. Atkinson Co.*, 195 F. 2d 141, 146–149 (C.A. 9); *Leedom* v. *International Brotherhood of Electrical Workers*, *supra*, 278 F. 2d at 243; *National Labor Relations Board* v. *Majestic Weaving Co.*, *supra*, 355 F. 2d at 860; *National Labor Relations Board* v. *E & B Brewing Co.*, *supra*, 276 F. 2d at 598. The view of the court below that an agency can apply new standards formulated in an adjudicatory proceeding only retroactively would compel administrative agencies either to impose what may be wholly unnecessary burdens on

[20] The propriety of the Board's promulgation of the *Excelsior* requirement in an adjudicatory proceeding is *a fortiori* in light of *Chenery*. In that case the probable effect of the Commission's ruling was "retroactively [to] prevent [the] management from securing the profits and control which were the objects of the preferred stock purchases" (332 U.S. at 203), even though the management was not on notice when it made the purchases that they were illegal. In the present situation, on the other hand, the *Excelsior* requirement was made prospective in operation, in order "to insure that all parties to forthcoming representation elections are fully aware of their rights and obligations as here stated" (A. 17, n. 5). And it had been in effect for seven months when, in this case, the Regional Director initially directed the Company to furnish the information (A. 11, n. 3), and for more than fifteen months when the district court so ordered (A. 107).

the participants in cases before them,[21] or needlessly to resort to the rule-making process where an adjudicatory proceeding would constitute an appropriate vehicle for considering the desirability of adopting a new standard or establishing a new requirement.

3. The theory of the court below that an agency is necessarily engaged in rule making rather than adjudication when a new standard prescribed in a decision is to have prospective effect only would make the propriety of an agency's choice between the two methods of proceeding turn on a circumstance which often cannot be anticipated in advance, and which has little bearing on the practical consequences of the agency's action and on the justness of the result reached (see note 21, *supra*). From a realistic point of view, the procedure the Board followed in *Excelsior* achieved, albeit through adjudication, substantially all that the public participation provisions of Section 4 of the Administrative Procedure Act were designed to accomplish. There the Board, upon learning that an issue over access to lists of employees' names and addresses had been raised in the proceeding, sought to and did obtain a broad range of views, by inviting leading employer and union groups to file

[21] Perhaps no injustice would have resulted from applying the *Excelsior* rule to the employers in that proceeding. But it was reasonable for the Board, in *Excelsior*, to seek to avoid any implication of unfairness and the administrative confusion in all other pending representation proceedings that would have resulted from giving immediate effect to the new requirement. Cf. *Ideal Electric & Mfg. Co.*, 134 NLRB 1275, 1278, approved in *Rockwell Mfg. Co., Kearney Division* v. *National Labor Relations Board*, 330 F. 2d 795, 798 (C.A. 7), certiorari denied, 379 U.S. 890.

briefs and present oral argument as *amici curiae*, on whether employers should be required to provide such lists prior to elections (A. 15). Consequently, in formulating its decision in *Excelsior*, the Board had the benefit of all the major arguments for and against imposing such an informational requirement.[22] See Shapiro, *supra*, 78 Harv. L. Rev. at 931.[23] Had the Board gone through the formality required by the court below, of publishing a notice of proposed rule making in the Federal Register and of inviting the views of interested parties (see note 7, *supra*), it is extremely unlikely that it would have obtained any more enlightenment on the problem.

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[22] Compare the Board's discussion in *Excelsior* (A. 22-28) of the arguments against adoption of the employee-list requirement, with the arguments raised by the Company here (see *infra*, pp. 35–40).

[23] The court of appeals suggested (A. 111) that, by soliciting "the assistance of selected amici curiae," the Board "designed its own rulemaking procedure, adopting such part of the Congressional mandate as it chose, and rejecting the rest." However, the practice of inviting and considering the views of *amici curiae* on issues of wide public concern which arise in an adjudicatory proceeding is an accepted judicial and administrative agency technique for accommodating the public and private aspects of adjudication. It has of course been frequently utilized by this Court and by other federal and State courts. Its use by an administrative agency was expressly approved in *Alabama-Tennessee Natural Gas Co.* v. *Federal Power Commission*, 359 F. 2d 318, certiorari denied, 385 U.S. 847. There the Fifth Circuit, in sustaining the agency's promulgation, in a rate-making proceeding, of a new rule requiring pipeline companies to pass on the tax saving resulting from liberalized depreciation allowances, and its decision to apply the new rule only to future rates, stated (359 F. 2d at 343):

> In this case the Commission felt that the time had come to reexamine the ratemaking treatment of liberalized depre-

Moreover, the *Excelsior* adjudicatory proceeding was well underway before the Board, as a result of the unions' objections to the elections held in that case, became aware of the employee-list issue and its implication for future proceedings. Under the view of the court below, the Board would then have had two alternatives, neither of which would have served the ends of practical and effective administration. It could have sidetracked the *Excelsior* proceeding itself and started an entirely new rule-making proceeding (see Shapiro, *supra*, 78 Harv. L. Rev. at 929), or else proceeded, without obtaining the views of interested persons, to determine whether to prescribe such an informational requirement, knowing that if it decided to do so that rule would necessarily be imposed on the parties to that case.

Nor was the respondent Company disadvantaged by the Board's enunciation of the *Excelsior* requirement in an adjudicatory proceeding and its failure to apply it to the elections in that proceeding. The Company ob-

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ciation. In applying its new policy to *Alabama-Tennessee*, the Commission could not overlook the wide application the change in policy would have on the natural gas industry. It was for the Commission to decide how to allow interested parties to present their views. It was clearly within the ambit of reasonable discretion to allow participation by amici in oral argument and by the filing of briefs.

We do not say that the Commission chose the best procedure for changing a longstanding policy. As long, however, as the Commission stays within constitutional and statutory limits, it is competent to determine whether to deal with a policy problem in an adjudicatory proceeding, a rulemaking proceeding, or a special proceeding of the type employed in this case[See also, to like effect, *City of Chicago* v. *Federal Power Commission*, 385 F. 2d 629, 643 (C.A. D.C.).]

viously was not affected by the Board's refusal to set aside the elections in the *Excelsior* case itself. Moreover, as the court below recognized (A. 111, n. 1), the fact that the *Excelsior* requirement, as finally formulated by the Board, was not published in the Federal Register, in accordance with 5 U.S.C. 552(a)(1), affords respondent no valid basis for complaint. Respondent had actual notice of the requirement, and it was not applied to it until seven months after it was first enunciated (well after the 30-day period prescribed in 5 U.S.C. 553(d), as noted by the court below, see A. 111, n. 2). Accordingly, the only possible injury to respondent was that, if the Board had followed the Administrative Procedure Act rule-making procedures in prescribing the *Excelsior* rule, it would as a result of the notice of the proposed rule published in the Federal Register (see 5 U.S.C. 553(b), (c)), have had an opportunity to present its views to the Board before the requirement was adopted. But this injury is certainly more theoretical than real, since the arguments on both sides of the issue were fully made by the parties and other interested *amici* (see note 3, *supra*). Moreover, to the extent that respondent had additional arguments, it had the opportunity to present them to the Board in the representation proceeding here initiated by the Unions in an effort to get the Board to abandon, or perhaps at least modify, the *Excelsior* rule (A. 32–33, 41).

In sum, neither sound legal principles nor practical considerations support the view of the court below that, simply because the Board elected to make the *Excelsior* requirement prospective in effect its action in formulating that principle was no longer adjudica-

tion but became rule making, and thus subject to the procedures required by Section 4 of the Administrative Procedure Act. As the Second Circuit concluded in *Beech-Nut* (App. B, p. 68):

> The National Labor Relations Board, like other agencies with quasi-judicial powers has the power to determine that a rule change be prospective if the Board feels that fairness to the parties before it demands that this approach be followed * * *. There is nothing anomalous about a prospective change in a legal rule occurring in an adjudicatory setting. In all fairness sufficient time may be required to permit persons to change systems and modes of dealing with one another * * *.[24]

B. IN ANY EVENT, THE BOARD'S *EXCELSIOR* DECISION ESTABLISHED A PROCEDURAL REQUIREMENT, WHICH IS EXPRESSLY EXEMPTED FROM THE RULE-MAKING PROCEDURES OF THE ADMINISTRATIVE PROCEDURE ACT

The Administrative Procedure Act explicitly exempts "rules of agency organization, procedure, or practice" from the requirements of advance notice and public participation that are applicable to substantive rule making (5 U.S.C. 552(a)(1)(D), 553(b)(3)(A) and (d)). Assuming *arguendo* that the Board's prescription of the *Excelsior* requirement was "rule making" rather than "adjudication" because of its prospective application, dissenting Judge Conn correctly concluded that its action was nonetheless exempted from the Act's rule-making procedures as

[24] See also the Ninth Circuit's similar approach in *British Auto Parts* (App. C, p. 76).

a rule of agency procedure or practice (A. 114–116).[25]

The requirement that employers file a list of the names and addresses of eligible voters for the use of all election participants[26] is equivalent to provisions for open voting registers commonly utilized in public and other private elections. As such, it is properly viewed as part of the procedural mechanism for conducting the election and registering the will of the voters. See *National Labor Relations Board* v. *Rohlen*, 274 F. Supp. 715, 717 (N.D. Ill.), affirmed, 385 F. 2d 52 (C.A. 7). Its purpose is two-fold: (1) to facilitate communication regarding election issues and thereby enhance the opportunity for an informed electorate;

[25] Procedural rules were exempted because Congress desired "to encourage such rules," and it believed that rules of this sort "vary so greatly in their contents and the occasion for their issuance that it seems wise to leave the matter of notice and public procedures to the discretion of the agencies concerned." Senate Judiciary Committee Print (June 1945), p. 6 (Leg. Hist. of the APA, p. 18). As the dissenting opinion here noted, these considerations would argue for a liberal construction of "procedural," and this conclusion is reinforced by the relatively restrictive definition and examples of "substantive" rules in the legislative history of the Act (A. 114–115). See *Attorney General's Manual on the Administrative Procedure Act*, p. 13, n. 5, p. 30, n. 3 (1947); 92 Cong. Rec. 5650 (Rep. Walter) (Leg. Hist. of the APA, p. 357).

[26] The Board's *Excelsior* requirement is applicable "in all election cases" (A. 17), with one limited exception (see note 28, *infra*). Moreover, the Regional Director is required to make the information disclosed available "to all parties in the case" (*ibid.*), not just to contesting unions. As the dissenting judge pointed out, "the Excelsior rule by its terms applies to 'all parties'—which include employees hostile to a new union or seeking decertification of an old one" (A. 116). Similarly, the majority of the court below referred to the Board's concern for the access of unions "and anti-union employees" to the names and addresses of employees (A. 110).

and (2) to permit advance checks on the identity of the eligible voters and thus speed the election processes by reducing the number of callenges requiring post-election investigation and resolution (A. 17–18, 21–22). See *National Labor Relations Board* v. *Rohlen, supra,* 385 F. 2d at 55.[27]

The court below acknowledged that requiring production of the *Excelsior* list for the second purpose—*i.e.*, "superintending or checking the voters"—would be a procedural regulation (A. 113). However, it held that the *Excelsior* requirement really served only the first purpose; and that the rule was thus substantive since it required "the employer to furnish interested parties with affirmative assistance in conducting their election campaigns" (*ibid.*). The court's reasons for discounting the second purpose of the rule are at least dubious.[28]

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[27] See also *National Labor Relations Board* v. *A. J. Tower Co.*, 329 U.S. 324, 331.

[28] The court concluded that the list would not facilitate settlement of issues of voting eligibility because the Board "already had a valid rule requiring the employer to furnish a checklist" of the names of eligible voters shortly before an election, and the *Excelsior* rule merely added the requirements of early filing and the inclusion of employee addresses (A. 113). In addition, the court noted that the rule expressly does not apply to the unusual expedited election, conducted pursuant to Section 8(b)(7)(C) of the Act, where the time interval is "too brief * * * for the union to be able to make any meaningful use of his information" (A. 113, quoting from *Excelsior*, A. 20, n. 14).

The Board in *Excelsior* frankly stated that the primary purpose of the rule is "to insure an informed electorate," and noted that it had previously required employees to file a voting eligibility list (without employee addresses, however) prior to the conducting of elections (A. 21). However, contrary to the

In any event, as the dissenting judge noted, the burden on the employer "in being compelled to furnish addresses of employees is inconsequential" (A. 115).[29] It is not comparable, as the court below concluded, to requiring an employer to make an assembly hall or a printing press available to groups requesting it (A. 113). Rather, the requirement is analogous to the provision in the Board's Statements of Procedure that elections "be adequately publicized by the posting of official notices in the [employer's] establishment" (29 C.F.R. 101.19, 101.21(b)), or to the previous requirement that the employer furnish a checklist of the eligible voters' names shortly before the election (see note 28, *supra*).[30] Like those requirements, the *Excel-*

court below, the Board also regarded the rule as serving the independent purpose of permitting unions to check the eligibility of voters in advance and so "eliminate the necessity for challenges based solely on lack of knowledge of the voter's identity" (A. 22). Furthermore, the Board concluded that "*bona fide* disputes between employer and union over voting eligibility will be more susceptible of settlement without recourse to the formal and time-consuming challenge procedures of the Board if such disputes come to light early in the election campaign rather than in the last few days before the election when the significance of a single vote is apt to loom large in the parties' calculations" (A. 22). These purposes are "uncontrovertedly procedural" (A. 115, n. 4).

[29] In the nature of things, the employer simply happens to be the best source for the employees' names and addresses, but they are in no proper respect his "secret". The employer's interest in maintaining a monopoly on effective opportunities for communication with the employees prior to the election cannot properly be termed a "substantive right" (A. 22, 116).

[30] The Board's Statements of Procedure (29 C.F.R. 101.17-101.19) impose many requirements on election participants. Employers may be required to submit jurisdictional data. Individuals or labor organizations filing petitions for representa-

sior rule makes minimal demands on the employer, and like them, it promotes election participation and facilitates resolution of issues of voter eligibility. Accordingly, it should be viewed as procedural, no less than these analogous rules are so regarded.

Contrary to the court's suggestion, the *Excelsior* requirement is not substantive because it assists non-employer parties to conduct their election campaigns by providing them with greater access to the electorate (A. 113). The basic purpose of the requirement is to establish a more democratic election procedure, by encouraging fair and full communication of the issues and thereby increasing the likelihood of an informed employee electorate (A. 18, 21). That the *Excelsior* requirement may, as an incident of achieving this purpose, benefit election participants who previously had no effective means of reaching the voters, does not transform it into a substantive rule. "Of course all procedural requirements may and do occasionally affect substantive rights, but this possibility does not make a procedural regulation a substantive one." *Ranger* v. *Federal Communications Commission*, 294 F. 2d 240, 244 (C.A.D.C.).

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tion or decertification must supply evidence that the petition is currently supported by at least 30 percent of the employees in the unit (29 C.F.R. 101.18(a)). Petitioning employers must produce evidence that the union named is seeking recognition; or, if the union is an incumbent, the employer must supply "a statement of the objective considerations demonstrating reasonable grounds for believing that the labor organization has lost majority status" (29 C.F.R. 101.17). Once an election is directed, arrangements for the mechanics of conducting the election must be made, observers chosen, and the times and places for the balloting picked—all of which require the cooperation of the election participants (29 C.F.R. 101.19, 101.21(b)).

II. THE *EXCELSIOR* REQUIREMENT IS A VALID AND PROPER EXERCISE OF THE BOARD'S POWERS UNDER THE NATIONAL LABOR RELATIONS ACT[31]

Under Section 9(c)(1) of the National Labor Relations Act, "Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees." *National Labor Relations Board* v. *A. J. Tower Co.*, 329 U.S. 324, 330. See also *National Labor Relations Board* v. *Waterman Steamship Corp.*, 309 U.S. 206, 226. The Board's *Excelsior* requirement is a reasonable exercise of that discretion. As has been indicated (*supra*, pp. 31–32), it serves the dual purpose of (1) giving employees voting in a representation election an effective opportunity to hear the arguments on all sides of the issue so that they will be in a better position to make an informed and reasoned choice, and (2) reducing the number of challenged ballots and simplifying representation proceedings by promoting advance settlement of questions of voting eligibility and by obviating the need for union challenges based solely on ignorance of the voter's identity.

Since open access to voter lists is universally recognized as consistent with the democratic process, the Board's adoption of a rule requiring employers to

[31] As noted previously, although the court below did not pass upon the substantive validity of the *Excelsior* requirement, five other courts of appeals have upheld it (*supra*, p. 6). Since respondent is likely to contest its validity on the merits as an alternative ground for upholding the judgment below (see note 5 *supra*), we discuss the question.

file such lists is "therefore in accord with the principles which Congress indicated should be used in securing the fair and free choice of collective bargaining representatives" (*National Labor Relations Board* v. *A. J. Tower Co.*, *supra*, 329 U.S. at 332).[32] Moreover, the five courts of appeals which have considered the question have held, and even the court below strongly suggested, that the *Excelsior* requirement is a proper exercise of the Board's statutory authority (see *supra*, p. 6)

1. The Company contends (Resp. Br., pp. 12–15) that, under the decisions of this Court in *National Labor Relations Board* v. *Babcock & Wilcox Co.*, 351 U.S. 105 and *National Labor Relations Board* v. *United Steelworkers* (*Nutone, Inc.*), 357 U.S. 357, the Board's authority to compel disclosure of employees' names and addresses is limited to cases where unions have no alternative means of communicating with the employees.[33] But both *Babcock* and *Nutone* dealt with the circumstances under which an employer commits an unfair labor practice, in violation of Section 8 of

[32] See also Bok, *The Regulation of Campaign Tactics in Representation Election Under the National Labor Relations Act*, 78 Harv. L. Rev. 38, 99–100 (1964), which states: "Since the opportunity for both sides to reach all employees is basic to a fair and informed election, the reasons for requiring disclosure seem just as strong as those leading to similar requirements under other provisions of the law."

[33] The Board in *Excelsior*, although acknowledging that, in some cases, "a party *might* be able to communicate with a substantial portion of the electorate even without possessing their names and addresses," concluded "that the access of *all* employees to such communications can be insured only if all parties have the names and addresses of all the voters" (A. 18).

the Act, by denying his employees access to union communications. As the Board noted in *Excelsior* (A. 25), the resolution of that issue depends on different considerations than those presented in determining the reasonableness of an employee-list rule for purposes of an election conducted under Section 9. As the Board further pointed out, "The existence of alternative channels of communication is relevant only when the opportunity to communicate made available by the Board would interfere with a significant employer interest—such as the employer's interest in controlling the use of the property owned by him" (A. 24).

Here, unlike in *Babcock* and *Nutone,* there is no necessity to balance, for "the employer has no significant interest in the secrecy of employee names and addresses" (*ibid.*). Moreover, the Board expressly stated that it was not, in *Excelsior,* considering or determining the question whether an employer's failure to provide an employee list would constitute an unfair labor practice under Section 8(a)(1) (A. 25–26; see A. 117–118).

2. The Company further contends (Resp. Br., pp. 9–11) that the *Excelsior* requirement invades the privacy of the potential voters in a representation election. But employees are not compelled to read union literature mailed to them, or to discuss the union with fellow employees or union representatives who might come to their homes for that purpose. Nor is it reasonable to assume that a union seeking to obtain employees' votes in a secret ballot election would engage in acts of harassment and coercion at their homes

(*National Labor Relations Board* v. *Hanes Hosiery Division*, *supra*, 384 F. 2d at 191). And if such conduct should occur in a particular case, the Board can provide an appropriate remedy (A. 23). Moreover, it is at least doubtful that the Company is in a position, as a matter of standing, properly to assert an alleged violation of employee privacy as a reason for the invalidation of the rule (see A. 24).

3. The Company also argues (Resp. Br., pp. 17–18) that unions already enjoy organizational advantages which employers lack, and the *Excelsior* requirement only adds to this imbalance. However, this argument overlooks that: (a) employers have a special relation to their employees which may make conduct by them coercive that would not be if engaged in by a union or other non-employer party;[34] and (b) as the Board noted, "employers are free to communicate with their

[34] Accordingly, the Board will set aside elections, on proper objection, where the employer has visited a significant number of employees in their homes prior to the election, because (1) his control of the employment relationship imparts a coercive effect to such systematic individual interviews, and (2) he has ample opportunity to address the employees in assembled or informal groups at work. Unions, on the other hand, not only "have more need to seek out individual employees to present their views, but, more important, lack the relationship with the employees to interfere with their choice of representative thereby." *Plant City Welding & Tank Co.*, 119 NLRB 131, 133–134. See *National Labor Relations Board* v. *Wolverine Industries Division*, 64 LRRM 2060, 2061 (E.D. Mich.), which notes that an employee is free to "turn his back" on union campaigners if he chooses, but, of "course, he can't turn his back to the boss if the boss comes to the home. Not if he is in his right mind, he can't."

employees in the plant; a union, as a practical matter, is severely limited in its efforts at in plant communications" (A. 27, n. 27; see A. 18).

4. The requirement that information be furnished to the Board, which the Board will then pass along to contesting unions and other interested parties in a representation proceeding (see note 26, *supra*), does not violate Section 8(a)(2) of the Act, which makes it an unfair labor practice for an employer to "contribute financial or other support to" a labor organization (A. 110). See *National Labor Relations Board* v. *Stowe Spinning Co.*, 336 U.S. 226, 230–231; *Kimbrell* v. *National Labor Relations Board*, 290 F. 2d 799, 802 (C.A. 4); *Perry Coal Co.* v. *National Labor Relations Board*, 284 F. 2d 910, 912, 913 (C.A. 7), certiorari denied, 366 U.S. 949; *Morgantown Full Fashioned Hosiery Co.*, 107 NLRB 1534–1535.[35] Similarly without substance is the contention (Resp. Br., pp. 21–25) that compelling an employer so to provide a list of names and addresses forces that company to give a "thing of value" to a labor organization, in violation of Section 302 of the Act (29 U.S.C. 186). As the district court noted, such a construction is "patently contrary to the intent of congress in enacting the statute" (A. 196). See *Zentner* v. *American Federa-*

[35] The cases cited by the Company (Resp. Br., p. 19) do not hold to the contrary. In those cases, the employer furnished the employees' names and addresses to only one of two competing unions or groups, in an effort to influence the employees to select or retain the representative whom he favored.

tion of Musicians, 237 F. Supp. 457, 462–463 (S.D. N.Y.), affirmed, 343 F. 2d 758 (C.A. 2).[36]

In sum, none of the Company's arguments invalidates the Board's *Excelsior* requirement. That requirement is "a valid exercise of the Board's power to ensure employees a fair and free choice in the selection of their representative." *Howell Refining Co. v. National Labor Relations Board, supra*, 400 F. 2d at 216.

III. THE BOARD MAY ENFORCE THE *EXCELSIOR* REQUIREMENT THROUGH APPROPRIATE PROCEEDINGS IN A FEDERAL DISTRICT COURT

A. THE BOARD MAY COMPEL PRODUCTION OF THE EMPLOYEES' NAMES AND ADDRESSES THROUGH A SUBPOENA ENFORCEMENT PROCEEDING IN THE DISTRICT COURT, UNDER SECTION 11(2) OF THE ACT

Section 11(1) of the National Labor Relations Act provides that the Board shall have access to "any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question," and empowers the Board to issue subpoenas "requiring the attendance and testi-

[36] See also *Arroyo* v. *United States*, 359 U.S. 419, 425–426, where it was stated: "Those members of Congress who supported the amendment [embodying Section 302] were concerned with corruption of collective bargaining through bribery of employee representatives by employers, with extortion by employee representatives, and with the possible abuse by union officers of the power they might achieve if welfare funds were left to their sole control." In any event, Section 302 expressly does not apply "with respect to the payment or delivery of any * * * thing of value in satisfaction of a judgment of any court * * *" (Section 302(c)(2), 29 U.S.C. 186 (c)(2)).

mony of witnesses or the production of any evidence in such proceeding or investigation." Section 11(2) provides that, in case of refusal to obey a subpoena, the district courts shall have jurisdiction, upon application by the Board, to issue an order requiring the person subpoenaed "to appear before the Board * * * there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question * * *."

The entire representation proceeding conducted by the Board under Section 9 of the Act, from the filing of the petition to the certification of election results, is an "investigation". See *Inland Empire District Council* v. *Millis*, 325 U.S. 697, 707. The basic aim of this investigation is to ascertain the wishes of the employees as to representation. As shown, the Board has reasonably concluded that making a list of employee names and addresses available to all election participants will further this purpose. Accordingly, employee lists are related to matters "under investigation or in question" in Section 9 representation proceedings.

However, the Company contends (Resp. Br., pp. 25–33) that, since the employee names and addresses will not be used by the Board to prove or disprove any fact in issue but will be made available to the contesting parties for electioneering purposes, such information cannot be regarded as "evidence" and hence is beyond the reach of the Board's subpoena power. The Company's construction of the term "evidence" as used in Section 11, we submit, is unduly restrictive. As the district court observed in this case (A. 104):

> Standard definitions of "evidence" * * * are not very helpful because the "something" at issue in this case is a group preference * * *. Also, the Board's function here is far from that of the traditional, passive fact finder. The Board is conducting an active representation investigation in which the regulation of an election is an integral part * * *.

Accordingly, that court concluded (A. 105):

> [I]n the context of § 11 of the Act, "evidence" means not only proof at a hearing but also books and records and other papers which will be of assistance to the Board in conducting a particular investigation.[37]

Consistent with and confirming this view, the Board has long been permitted to subpoena employment and payroll records to compile a voter checklist when the employer refuses to supply one.[38] This information serves more than a conventional evidentiary purpose, since it aids the Board in (1) determining administratively whether the employees have a sufficient interest in union representation (or decertification) to war-

[37] Dissenting Judge Coffin accepted the Company's view, however, but held that the *Excelsior* requirement could be enforced by means of an injunctive suit (A. 117–118).

[38] See *National Labor Relations Board* v. *Cudahy Packing Co.*, 34 Supp. 53, 56 (D. Kan.), affirmed, 117 F. 2d 692, 693 (C.A. 10); *National Labor Relations Board* v. *Northern Trust Co.*, 56 F. Supp. 335, 336 (N.D. Ill.), affirmed, 148 F. 2d 24 (C.A. 7), certiorari denied, 326 U.S. 731; *National Labor Relations Board* v. *New England Transportation Co.*, 14 F. Supp. 497, 498, 499 (D. Conn.). See also the Board's brief in *National Labor Relations Board* v. *A. J. Tower Co.*, No. 60, 1946 Term, p. 37, n. 14: "We are not here concerned with the procedure followed where the employer refuses to supply such a list. Sometimes the Board subpoenas the payroll. * * *"

rant the holding of an election, (2) attempting to resolve any questions of voting eligibility by agreement of the parties shortly before the election, and (3) checking off the eligible voters as they appear at the polls to cast their ballots."[39]

The employee list that the *Excelsior* rule requires is similarly relevant and helpful to the Board in the conducting of a representation election. To be sure, like the voter checklist, it must be made available to all parties to the election if it is to perform its functions of assuring an informed electorate and of encouraging prior settlement of issues of voting eligibil-

[39] It may be argued that uses (1) and (2) fit the traditional definition of "evidence" in that they involve the Board's direct resolution of factual questions. More realistically, however, these uses simply help the Board to handle the mechanics of screening out frivolous petitions and of conducting elections in cases that survive the screening. Thus, the 30-percent showing of interest, involved in use (1) above, is not an issue subject to litigation by the parties. See *Kearney & Trecker Corp.* v. *National Labor Relations Board*, 209 F. 2d 782, 786–788 (C.A. 7); *National Labor Relations Board* v. *J. I. Case Co.* 201 F. 2d 597, 598–599 (C.A. 9); Board's Statements of Procedure, Sec. 101.18(a) (29 C.F.R. 101.18(a)). It is merely a question that the Board asks itself in determining administratively whether the petitioner has a sufficient chance of winning to warrant the expenditure of government time, effort, and money in conducting a representation election. Similarly, with respect to use (2) above, the hope is that the parties, by checking and approving the list of eligible voters in a pre-election conference, will obviate the need for the Board to conduct challenge proceedings to determine issues of voting eligibility after the election. See Board's Statements of Procedure, Secs. 101.19(a) (1), 101.21(b) (29 C.F.R. 101.19(a), 101.21(b)). Accordingly, neither of these uses of the checklist qualifies it merely as "proof of a fact in issue" before the Board (A. 117).

ity.[40] But, although the parties may use the *Excelsior* list in an effort to achieve their own aims of winning over the voters, this is only incidental to the statutory goal of a more democratic election that is ultimately served by the requirement. Accordingly, just as the payroll and employment records used for the voter checklist are viewed as "evidence" for purposes of Section 11, even though their use is not confined to the conventional evidentiary purpose of proving or disproving a fact in issue, so the employee names and addresses required by *Excelsior* should be similarly regarded.

That Congress intended under Section 11 to give the Board access not only to evidence in a conventional sense, but to all information relevant to the performance of its functions under the Act, is confirmed by the preamble to that section. It provides that the subpoena powers enumerated therein shall be "for the purpose of hearings and investigations

[40] The propriety of disclosing subpoenaed information to aid an agency in carrying out its statutory responsibilities is well settled, in the absence of an overriding private interest in favor of confidentiality. See *Federal Communications Commission* v. *Schreiber*, 381 U.S. 279; *National Labor Relations Board* v. *Friedman*, 352 F. 2d 545, 548 (C.A. 3). No such private interest is present here, for, as the Board noted in *Excelsior*: "A list of employee names and addresses is not like a customer list, and an employer would appear to have no significant interest in keeping the names and addresses of his employees secret (other than a desire to prevent the union from communicating with his employees—an interest we see no reason to protect). Such legitimate interest in secrecy as an employer may have is, in any event, plainly outweighed by the substantial public interest in favor of disclosure where, as here, disclosure is a key factor in insuring a fair and free election" (A. 22).

which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by section 9 and section 10 * * *." The same intention is reflected in the pertinent Committee reports:[41]

> For the purpose of all hearings and investigations which in the opinion of the Board are necessary and proper for the exercise of the powers vested in it by section 9 and section 10, there is granted in section 11 the subpoena powers typically provided for similar administrative bodies without which their work would be ineffectual. The section grants no roving commission, but is limited to the exercise of powers and functions embodied in sections 9 and 10 * * *.[42]

Finally, the view that an administrative agency like the Board is vested with authority to subpoena all information relevant to the performance of its congressionally delegated functions is supported by this Court's decision in *United States* v. *Morton Salt Co.*,

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[41] See, *e.g.*, H. Rep. No. 1147 on S. 1958, 74th Cong., 1st Sess., p. 25 (II Leg. Hist. of the NLRA, p. 3076).

[42] See also Comparison of S. 2926 and S. 1958, Memorandum of March 11, 1935, 74th Cong., 1st Sess., p. 40 (I Leg. Hist. of the NLRA, p. 1367), noting that the provision in Section 11, granting the Board access to "evidence related to matters under investigation," was identical to provisions in the Federal Trade Commission Act, the Interstate Commerce Act, and the Communications Act, and that "similar" powers were granted to the Railway Labor Board ("the Board shall have access to * * * the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph"), and to the National Steel Board ("the Board shall have access to such payrolls and other documents as will enable the Board to prepare and certify lists of employees eligible to vote in elections").

338 U.S. 632.[45] There the Federal Trade Commission sought to require corporations to file reports showing how they had complied with a court decree enforcing a Commission cease-and-desist order. This Court upheld the Commission's power to compel such reports in the exercise of its statutory power to investigate compliance, stating (338 U.S. at 642):

> The only power that is involved here is the power to get information from those who best can give it and who are most interested in not doing so. Because judicial power is reluctant if not unable to summon evidence until it is

[45] See generally Note, *Resisting Enforcement of Administrative Subpoenas Duces Tecum*, 69 Yale L.J. 131, 133 (1959); Cooper, *Federal Agency Investigations: Requirements for the Production of Documents*, 60 Mich. L. Rev. 187, 189–190 (1961); Note, *Use of Contempt Power to Enforce Subpenas and Orders of Administrative Agencies*, 71 Harv. L. Rev. 1541, 1543 (1958). The more restrictive view of an administrative agency's subpoena powers expressed in *Federal Trade Commission* v. *American Tobacco Co.*, 264 U.S. 298, has been modified by the subsequent decisions of this Court, such as *Morton Salt*. See also *National Labor Relations Board* v. *Rohlen*, *supra*, 385 F. 2d at 58; 1 Davis, *supra*, p. 163, Sec. 3.02; and the law review commentaries cited above. In any event, *American Tobacco* does not support the view, attributed to it by the respondent below, that the term "evidence" is to be given a technical construction in statutory grants of administrative subpoena power; rather, that case involved a construction of the term "relevant"—an issue not presented here. See also comparison of S. 2926 and S. 1958, Memorandum of March 11, 1935, *supra*, p. 41 (I Leg. Hist. of the NLRA, p. 1369), referring to the "very restrictive" construction given the phrase "documentary evidence" in *American Tobacco*, and concluding that the term "evidence" should be used in the National Labor Relations Act to guarantee the Board access to records "such as pay rolls, which the Board would have most need of."

> shown to be relevant to issues in litigation, it does not follow that an administrative agency charged with seeing that the laws are enforced may not have and exercise powers of original inquiry. * * *

See also *United States* v. *Powell*, 379 U.S. 48, 53–54.

Significantly, the four courts of appeals which have reached the question have construed the term "evidence", as used in Section 11 of the National Labor Relations Act, in a broad fashion to encompass any information relevant to the performance of the Board's statutory functions. They have therefore concluded that the *Excelsior* requirement may be enforced by means of a subpoena issued by the Board under that section, with resort to a district court available should compliance be refused. *National Labor Relations Board* v. *Rohlen*, 385 F. 2d 52, 55–58 (C.A. 7); *National Labor Relations Board* v. *Beech-Nut Life Savers, Inc.*, App. B, pp. 69–70 (C.A. 2); *British Auto Parts, Inc.* v. *National Labor Relations Board*, App. C, pp. 76–77 (C.A. 9); *National Labor Relations Board* v. *Hanes Hosiery Division*, 384 F. 2d 188, 191–192 (C.A. 4), certiorari denied, 390 U.S. 950."

" Moreover, even accepting a more restrictive definition of the term "evidence," the information sought by the Board here should be compellable under Section 11 of the Act. The ultimate question to be answered in the representation investigation conducted by the Board is whether an informed employee electorate will select a union as collective bargaining representative in a free and fair election. A list of the names and addresses of employees eligible to vote in the election, which is to be made available to all parties for the purpose of communicating election issues and determining eligible voters, is relevant to the res-

B. THE BOARD MAY COMPEL PRODUCTION OF THE EMPLOYEES' NAMES AND ADDRESSES IN A DISTRICT COURT SUIT FOR INJUNCTIVE RELIEF UNDER 28 U.S.C. 1337

Alternatively, production of a list of employees' names and addresses may be compelled through an injunctive suit under 28 U.S.C. 1337. That section provides that the district courts shall have jurisdiction of all suits and proceedings under any law regulating commerce. It has consistently been held that under this provision the district courts have power to grant injunctive relief to aid administrative agencies, operating under laws regulating commerce like the National Labor Relations Act, in carrying out their statutory functions—even though there is no express authorization for such relief in their respective enabling acts. See. *Capital Service, Inc.* v. *National Labor Relations Board*, 347 U.S. 501, 504; *Amalgamated Clothing Workers* v. *Richman Bros.*, 348 U.S. 511, 521–524, 526–527 (dissenting opinions); *National La-*

olution of that ultimate issue. As the Seventh Circuit concluded in *Rohlen*, *supra*, 385 F. 2d at 57:

> Even if we adopt the orthodox view that evidence tends to prove or disprove the existence of a disputed fact or something in issue, the "something in issue" in a representation proceeding under section 9 is the employee group-preference. An *Excelsior* list, by facilitating a fully informed electorate, is evidence which aids in the establishment of that group-preference.

Similarly, as stated in *British Auto Parts* (App. C, p. 77):

> [T]he addresses as well as the names of employees could properly be found by the Board to be information which would be facilitative of both the process and the object of a representation election, and so subject to demand as "evidence" in a practical application of that term to the nature and aspects of such a proceeding.

bor Relations Board v. *New York State Labor Relations Board,* 106 F. Supp. 749, 752–753 (S.D.N.Y.), and cases there cited; *Walling* v. *Brooklyn Braid Co.,* 152 F. 2d 938, 940–941 (C.A. 2); *Federal Maritime Commission* v. *Atlantic & Gulf/Panama Canal Zone,* 241 F. Supp. 766, 774–775 (S.D.N.Y.).

In this type of suit the question before the district court is "whether the injunction is reasonably required as an aid in the administration of the statute, to the end that the Congressional purposes underlying its enactment shall not be thwarted." *Walling* v. *Brooklyn Braid Co., supra,* 152 F. 2d at 941. Moreover, the general equitable jurisdiction of the district courts extends to actions brought to carry out the public purpose despite the absence of any express authority, for "there is inherent in the Courts of Equity a jurisdiction to * * * give effect to the policy of the legislature." *Reich* v. *Webb,* 336 F. 2d 153, 158 (C.A. 9), certiorari denied, 380 U.S. 915, quoting from *Mitchell* v. *DeMario Jewelry,* 361 U.S. 288, 291–292. See also *International Ass'n of Machinists* v. *Central Airlines Inc.,* 372 U.S. 682, 690–696; *Texas & New Orleans R.R. Co.* v. *Railway Clerks,* 281 U.S. 548, 569–570; *Shafer* v. *United States,* 229 F. 2d 124, 128 (C.A. 4), affirming 132 F. Supp. 659, 669 (D. Md.), certiorari denied, 351 U.S. 931; *United States* v. *Feaster,* 330 F. 2d 671, 674, and 376 F. 2d 147, 148–149 (C.A. 5), certiorari denied, 389 U.S. 920. As dissenting Judge Coffin here concluded (A. 118), this test is satisfied with respect to such enforcement of the *Excelsior* requirement.

Section 9(c) of the National Labor Relations Act authorizes the Board to establish the procedures and safeguards for the conducting of fair representation elections, and the *Excelsior* requirement was adopted pursuant to that authorization (*supra*, pp. 35–36). The aid of the district court may be necessary to make this exercise of the Board's statutory functions effective. Normally the Board itself enforces its election requirements by setting aside, on proper objection, elections in which a party has engaged in conduct that the Board finds destructive of a free and fair employee choice. When the effects of that conduct are deemed to be dissipated, a new election is held, and the party who initially engaged in the conduct usually has nothing much to gain by repeating it.

But, in the case of the *Excelsior* requirement, an employer may simply decide that he does not want to share with a union the advantages he has in communicating with his employees, and thus may adamantly refuse to furnish a list of their names and addresses to the Regional Director on a continuing basis. Accordingly, if the Board were remitted solely to the sanction of setting aside elections in which its rule had not been complied with, an employer's persistent non-compliance could block a valid election indefinitely, or delay it at will, in contravention of the congressional policy favoring the prompt resolution of questions of employee representation. See Note, *The Judicial Role in the Enforcement of the "Excelsior Rule"*, 66 Mich. L. Rev. 1292, 1297–1298 (1968).

It is no answer that the Board could enforce its *Excelsior* rule by finding the refusal to comply with

the employee-list requirement a violation of Section 8(a)(1) of the Act, which makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees" in the exercise of their statutory rights (see A. 117–118). Although the Board has not yet determined whether a failure to comply with the *Excelsior* requirement would violate Section 8(a)(1), and specifically found it unnecessary to do so here (A. 25–26), it is well settled that conduct which may interfere with the "laboratory conditions" desirable for an employee election need not amount to interference, restraint, and coercion within the meaning of Section 8(a)(1).[46] Moreover, since the Board's power to regulate elections under Section 9 of the Act is independent of its authority to remedy unfair labor practices under Section 10, its ability to enforce an election rule like that adopted in the *Excelsior* case should not be dependent on finding non-compliance therewith to be an unfair labor practice.

[46] See *General Shoe Corp.*, 77 NLRB 124, 126, where the Board stated:

> "When we are asked to invalidate elections held under our auspices, our only consideration derives from the Act which calls for freedom of choice by employees as to a collective bargaining representative" [quoting *R. D. Gwaltney*, 74 NLRB 371, 373]. Conduct that creates an atmosphere which renders improbable a free choice will sometimes warrant invalidating an election, even though that conduct may not constitute an unfair labor practice. An election can serve its true purpose only if the surrounding conditions enable employees to register a free untrammeled choice for or against a bargaining representative. * * *

See also *National Labor Relations Board* v. *Shirlington Supermarket*, 224 F. 2d 649, 652 (C.A. 4), certiorari denied, 350 U.S. 914.

Neither *Leedom* v. *Kyne*, 358 U.S. 184, nor *Boire* v. *Greyhound Corp.*, 376 U.S. 473, militates against equitable relief in cases like the instant one. Both of those cases involved attempts to obtain direct review of Board orders in representations proceedings of the kind that ordinarily were not reviewable at that stage of the proceeding. In *Leedom*, the Court, although sustaining the exercise of district court jurisdiction, limited it to a situation where the Board has acted "contrary to a specific prohibition in the Act" and where "'absence of jurisdiction of the federal courts' would mean 'a sacrifice or obliteration of a right which Congress' has given" (358 U.S. at 188, 190). It did so because the legislative history of the National Labor Relations Act demonstrated that "Congress knew that if direct judicial review of the Board's investigation and certification of [bargaining] representatives was not barred, 'the Government [could] be delayed indefinitely before it [took] the first step toward industrial peace'" (358 U.S. at 192, 194) (dissenting opinion). And the Court simply confirmed the limited holding of *Kyne in Boire* v. *Greyhound*, *supra*, 376 U.S. at 480–481.

Here the situation is entirely different. Intervention by a district court to enforce the *Excelsior* requirement, if necessary, would aid, rather than subvert, the congressional policy that questions of representation be promptly resolved under the procedures adopted by the Board for conducting fair and free employee elections. Cf. *United States* v. *Feaster*, *supra*, 376 F. 2d at 148–149, 150–151, nn. 1, 2, and 4.

Accordingly, the district courts have authority, under 28 U.S.C. 1337, to issue mandatory injunctions in such situations.

CONCLUSION

The judgment of the court of appeals dismissing the Board's complaint should be reversed, and the case should be remanded to the court of appeals with directions either to affirm the judgment of the district court enforcing the subpoena or to remand the case of the district court for the entry of an appropriate injunction.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

FRANCIS X. BEYTAGH, Jr.,
Assistant to the Solicitor General.

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,

MARION L. GRIFFIN,
Attorney,
National Labor Relations Board.

JANUARY 1969.

APPENDIX A

1. The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*) are as follows:

> SEC. 6. The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of this Act.
>
> * * * * *
>
> SEC. 9(c)(1). Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—
>
> (A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or
>
> (B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative as defined in section 9(a); the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted

by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

* * * * *

SEC. 10(b). Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: * * * Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States * * *.

(c). The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may

take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

* * * * * *

SEC. 11. For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by section 9 and section 10—

(1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. Within five days after the service of a subpena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpena does not describe with sufficient particularity the evidence whose pro-

duction is required. Any member of the Board, or any agent or agency designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing.

(2) In case of contumacy or refusal to obey a subpena issued to any person, any district court of the United States or the United States courts of any Territory or possession, within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

* * * * * *

SEC. 14(c)(1). The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to the Administrative Procedure Act, decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: *Provided,* That the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standard prevailing upon August 1, 1959.

2. The relevant provisions of the Administrative Procedure Act, as amended (60 Stat. 237, 80 Stat. 381, 81 Stat. 54, 5 U.S.C. 551, *et seq.*) are as follows:

SEC. 552. PUBLIC INFORMATION * * *

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public— * * *

* * * * *

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. * * *

* * * * *

SEC. 553. RULE MAKING

* * * * *

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

(Argued April 10, 1968 Decided December 3, 1968.)

Docket No. 32002

NATIONAL LABOR RELATIONS BOARD,
PETITIONER-APPELLEE

v.

BEECH-NUT LIFE SAVERS, INC., RESPONDENT-APPELLANT

Before LUMBARD, CHIEF JUDGE,
WATERMAN and KAUFMAN, CIRCUIT JUDGES

WATERMAN, *Circuit Judge*:

This case is here on appeal from a final judgment order of the United States District Court for the Southern District of New York granting the National Labor Relations Board's application for enforcement of a subpoena *duces tecum* directed to appellant Beech-Nut Life Savers, Inc. pursuant to Section 11(2) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519; 29 U.S.C. §§ 151 et seq.). The district court's opinion is reported at 274 F. Supp. 432. The jurisdiction of this court is invoked under 28 U.S.C. §§ 1291 and 1294.

On February 18, 1966, Office & Professional Employees International Union, Salesmen's Division,

Local 153, AFL-CIO (Local 153), petitioned the Board for a representation election to be held among certain of the appellant's salesmen. Two other unions, District 65, Retail, Wholesale and Department Store Union, AFL-CIO, and Joint Organizing Committee of Locals 342, 400, 467, 474, and 489, Amalgamated Meat Cutters & Food Employees Union, AFL-CIO, intervened in the proceeding. The Regional Director for Region 2, New York City, on April 14, 1966, ordered that an election by secret ballot be conducted among the affected salesmen of appellant. In his Direction of Election the Regional Director ordered appellant, among other things, to comply with the rule announced by the Board in *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966).

The Board's *Excelsior* rule requires an employer to file with the Board's Regional Director a list of the names and addresses of all employees eligible to vote in a representation election within 7 days after the Director's direction of an election or after the close of a payroll period determinative for eligibility purposes, whichever is later. This list is made available to all parties participating in the representation proceeding in order to facilitate the communication of election issues to the employees and the prompt resolution of questions relating to the voting eligibility of particular employees. The *Excelsior* rule also provides that an employer's failure to file the required list is ground for setting the election aside whenever proper objections to the election are filed.

Appellant failed to file the *Excelsior* list. On July 20, 1966, one day before the scheduled election, the company submitted a list of names of the voters but without addresses.

On July 21, 1966, an election was conducted in which 88 votes were cast for local 153, 3 votes for one

of the intervening unions, no votes for the other intervening union, and 135 votes against representation by any union. Local 153 filed objections to the election because appellant had not complied with the *Excelsior* rule.

The Regional Director sustained the Local's objections, set aside the election, and ordered a second election. Appellant maintained that the July 21 election was a valid one, attacked the validity of the *Excelsior* rule and the impropriety of the Board's insistence upon compliance with the Rule in this representation proceeding. In the meantime the two intervening unions were permitted to withdraw from participation in the second election.

On November 29, 1966, the Regional Director issued a Notice of Rerun Election and notified the Company by letter that it had until December 7, 1966 to submit an *Excelsior* list. In a letter dated December 5, 1966 appellant refused to supply the *Excelsior* list. Because of appellant's continued refusal to furnish an *Excelsior* list, the second election was indefinitely postponed by the Regional Director.

On December 13, 1966, the Regional Director caused a subpoena *duces tecum* to be issued, pursuant to Section 11(2) of the Act, directing the appellant to produce and make available to the Board's Regional Office the appellant's personnel payroll records or, in lieu thereof, a list containing the names and addresses of all employees eligible to vote in the election. The appellant refused to comply with the subpoena or otherwise furnish the list and petitioned to have the subpoena revoked. The Board denied appellant's petition and applied in the district court for enforcement of the subpoena, or, alternatively, for a mandatory injunction directing the appellant to comply with the *Excelsior* rule. Jurisdiction was based on Sections 11

(2) and 9(c) of the National Labor Relations Act, and on 28 U.S.C. § 1337. The district court upheld the *Excelsior* rule, refused to review the validity of the first election and entered judgment on November 1, 1967. It granted enforcement of the Board's subpoena. It also ordered that the appellant should, within seven days of the receipt of a notice from the Regional Director that a second election was to be held, forward the subpoenaed information to the Director. The court found it unnecessary to issue the alternatively requested mandatory injunction. This appeal followed.

Appellant's main contention is that the Board's *Excelsior* rule, regardless of whether the rule is a desirable or an undesirable one, is invalid and unenforceable because it was not promulgated in the manner required by the applicable provisions of the Administrative Procedure Act, 5 U.S.C. §§ 551–553. This contention is supported by two separate arguments. Appellant's first argument is that rules of general applicability and future effect, 5 U.S.C. § 551(4), such as the *Excelsior* rule, can only be promulgated after *quasi-legislative* agency proceedings which conform with the Administrative Procedure Act's provisions dealing with *quasi-legislative* agency rule-making, 5 U.S.C. §§ 551–553; and, that only "orders," 5 U.S.C. § 551(6), which are applied to the particular case before the agency can be formulated in *quasi-judicial* agency proceedings. 5 U.S.C. § 551(7). Appellant's second argument is that, even if rules of general applicability and future effect can be formulated in the course of a *quasi-judicial* agency proceeding, the agency must be adjudicating the rights of parties before the agency when the rules are formulated, and that this was not the situation when the *Excelsior* rule was announced in *Excelsior Underwear, Inc., supra.* We do not agree with appellant's analysis or with its arguments.

Appellant's first position is grounded upon too narrow an interpretation of the range of powers given to the Board and of the regulations governing the manner in which the powers delegated to it may be exercised. Basically, the Board has the authority to use either of two procedures in dealing with the specialized problems it encounters in the administration of federal labor laws. The Board can resolve a problem arising within its limited jurisdictional sphere either by quasi-legislative promulgation of general rules designed to meet the problem, National Labor Relations Act § 6, 29 U.S.C. § 156; 5 U.S.C. § 551–553; or in quasi-judicial proceedings when the problem arises as an issue in a case before the Board, National Labor Relations Act § 6, 29 U.S.C. § 156; 5 U.S.C. §§ 554, 556, 557. The procedure it chooses to follow in resolving any particular problem is a matter for the Board, in its informed judgment, to decide. E.g., *SEC* v. *Chenery Corp.*, 332 U.S. 194, 202–03 (1947); *NLRB* v. *Seven-Up Bottling Co.*, 344 U.S. 344 (1953); *NLRB* v. *Penn Cork and Closures, Inc.*, 376 F. 2d 52, 57 (2 Cir. 1967); *NLRB* v. *A.P.W. Products Co.*, 316 F. 2d 899 (2 Cir. 1963).[1]

[1] The NLRB has been criticized in the past both by this court, see e.g., *NLRB* v. *Majestic Weaving Co.*, 355 F. 2d 854 (2 Cir. 1966); *NLRB* v. *Penn Cork and Closures, Inc.*, 376 F. 2d 52 (2 Cir. 1967), and by legal commentators, see, e.g., 1 Davis, Administrative Law Treatise § 6.13 at 149 (1967 Supp.); Peck, The Atrophied Rule-Making Powers of the National Labor Relations Board, 70 Yale L. J. 729, 752–761; Shapiro, The Choice of Rulemaking or Adjudication in the Development of Administrative Policy, 78 Harv. L. Rev. 921 (1965), because the Board has not fully utilized its *quasi-legislative* rule-making powers to their full advantage. However, regardless of the fact that the courts and the commentators would prefer to see the Board employ *quasi-legislative* procedures more often than it has, the Board has not seen fit to proceed in this manner.

Strictly construed, the Administrative Procedure Act could be interpreted as limiting all agency rule making to quasi-legislative proceedings. However, we do not believe Congress intended that the Act should be so strictly construed. Congress, in giving the National Labor Relations Board quasi-judicial powers, "cannot have been blind to the fact that the adjudicative process of the agencies, like that of the courts, gives birth to 'rules,' which may apply for the past for the future, or, more generally, for both . . ." *NLRB* v. *A.P.W. Products Co., supra* at 905; see *Wyman-Gordon Co.* v. *NLRB,* 397 F. 2d 394 (1 Cir. 1968), cert. granted, 37 L. W. 3177 (U. S. Nov. 12, 1968); *cf.* National Labor Relations Act §14(c)(1), 29 U. S. C. §164 (c)(1).[2] Therefore we hold that either of the congressionally authorized proceedings can be a proper source of Board rules having general applicability and future effect.

Appellant's second argument, that the Board was not adjudicating the rights of the parties before the Board when it announced the *Excelsior* rule, is supported by a recent First Circuit decision. In *Wyman-Gordon Co.* v. *NLRB,* 397 F. 2d 394 (1 Cir. 1968), the First Circuit held that the *Excelsior* rule was not properly promulgated in the course of an adjudicatory proceeding and consequently was promulgated in violation of the Administrative Procedure Act. With

[2] Over the years a great many rules have been formulated and applied by the Board in its *quasi-judicial* proceedings. E.g., *Brooks* v. *NLRB*, 348 U. S. 96 (1954); *NLRB* v. *Auto Ventshade, Inc.*, 276 F. 2d 303 (5 Cir. 1960); *NLRB* v. *Pittsburgh Plate Glass Co.*, 270 F. 2d 167 (4 Cir. 1959), cert. denied, 381 U. S. 943 (1960); *Peerless Plywood*, 107 NLRB 427 (1953).

all due respect, we do not agree with the First Circuit.[3]

If the *Excelsior* rule had been tacked onto an opinion dealing with completely unrelated facts and issues we would be inclined to agree with the First Circuit. This was not the situation in *Excelsior*, however. In *Excelsior*, the Union, after losing a Board-directed election, filed timely objections to certain pre-election employer conduct. One objection was that the employer refused to supply a list of names and addresses of its employees. *Excelsior Underwear, Inc., supra* at 1236. The Board considered this objection and the arguments made with reference to it and in the course of its decision announced the *Excelsior* rule which was to be applied to all future representation election cases. *Excelsior Underwear, Inc., supra* at 1239. Out of considerations of fairness the Board decided not to apply the new election rule to *Excelsior Underwear, Inc., supra* at 1240, n. 5, and the union's objection was overruled. Clearly the rule announced in *Excelsior* was substantially based on the facts and issues of that case.

It is true that the new rule extended beyond the immediate facts of the *Excelsior* case and was designed to be applicable to all future representation elections, but this is not a fatal defect. On the contrary, the Board in devising a rule is not limited to the particular facts of the case presented to it for adjudication. Cf. *NLRB* v. *Seven-Up Bottling Co., supra* at 348-349. Effective administration of our federal labor laws and the sound resolution of conflicts arising in the course of administering those laws de-

[3] The Fifth Circuit in a recent decision, *Howell Refining Co.* v. *NLRB*, —— F. 2d —— (5 Cir. 1968), has also declined to follow the First Circuit's *Excelsior* ruling in *Wyman-Gordon Co.* v. *NLRB*, 397 F. 2d 394 (1 Cir. 1968).

mand that the Board bring all its accumulated knowledge and experience to bear on any problem before announcing a rule designed to deal with that problem.

This second argument of appellant in support of its main contention, that the rule was not one which could be properly promulgated in a *quasi-judicial* proceeding, because it was not applied to the parties in the *Excelsior* case and only applied prospectively, is, as is its first argument, without merit. The National Labor Relations Board, like other agencies with *quasi-judicial* powers, has the power to determine that a rule change be prospective if the Board feels that fairness to the parties before it demands that this approach be followed. See *NLRB* v. *E & B Brewing Co.*, 276 F. 2d 594 (6 Cir. 1960), *cert. denied*, 360 U.S. 908 (1961); cf. *Rockwell Mfg. Co., Kearney Division* v. *NLRB*, 330 F. 2d 795 (7 Cir.), *cert. denied*, 379 U.S. 890 (1964); *Optical Workers' Union* v. *NLRB*, 227 F. 2d 687 (5 Cir. 1955). There is nothing anomalous about a prospective change in a legal rule occurring in an adjudicatory setting. In all fairness sufficient time may be required to permit persons to change systems and modes of dealing with one another. See *Safarik* v. *Udall*, 304 F. 2d 944, 949–950, n. 4 and n. 5 (D.C. Cir. 1962).

Therefore we hold that the *Excelsior* rule was not adopted in violation of the requirements of the Administrative Procedure Act.

Additionally, appellant attacks the *Excelsior* rule as being an abuse of the supervisory powers of the Board over representation elections. We find nothing in the contentions appellant advances which have not been fully and carefully considered and properly rejected either by the Board in *Excelsior Underwear, Inc., supra*, or the courts which have had occasion to

examine the *Excelsior* rule. *NLRB* v. *Rohlen,* 385 F. 2d 52, 55, n. 2 (7 Cir. 1967); *NLRB* v. *Hanes Hosiery Division, Hanes Corp.,* 384 F. 2d 188 (4 Cir. 1967), *cert. denied,* —— U.S. ——, 88 S. Ct. 1041 (1968). There is no need to reiterate the Board's and the courts' well articulated discussions which are more than adequate to dispose of these contentions.

Appellant also maintains that the district court erred in enforcing the subpoena requested by the Board for, first, the subpoena does not call for the production of "evidence" or "testimony" as required by the National Labor Relations Act. National Labor Relations Act § 11; U.S.C. § 161 (1964).[4] We do not agree.

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[4] 29 U.S.C. § 161(1) reads:

§ 161. Investigatory powers of Board

For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by sections 159 and 160 of this title—

Documentary evidence; summoning witnesses and taking testimony

(1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. Within five days after the service of a subpena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpena if in its opinion the evidence whose production is required does not relate to any matter under investigation,

The term "evidence," as used in this section of the National Labor Relations Act, has not been limited to formal proof of disputed facts presented in a trial-type hearing. Rather, it has been construed by the courts so as to permit the Board to subpoena data which is relevant and helpful to a matter "under investigation" or "in question." E.g., *NLRB* v. *Rohlen, supra* at 55–58; *NLRB* v. *Hanes Hosiery Division, Hanes Corp., supra;* but see, e.g., *NLRB* v. *Q-T Shoe Co.,* 279 F. Supp. 1 (D.N.J. 1968); see generally, Note, *The Judicial Role in the Enforcement of the "Excelsior Rule,"* 66 Mich. L. Rev. 1292 (1968). The *Excelsior* rule and the subpoenas issued in aid of the rule are designed to assist the Board in fulfilling its statutory duties to investigate questions of representation and to supervise representation elections. E.g., *NLRB* v. *Rohlen, supra; NLRB* v. *Hanes Hosiery Division, Hanes Corp., supra; Excelsior Underwear, Inc., supra.* The district court's enforcement of the Board issued subpoena was entirely proper.

Second, appellant contends that, although there had not been exact compliance with the *Excelsior* rule, there had been substantial compliance with the policies underlying it. This contention is based on the alleged fact that the unions, at the time of the challenged election, had a list of the names and addresses of all eli-

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or any matter in question in such proceedings, or if in its opinion such subpena does not describe with sufficient particularity the evidence whose production is required. Any member of the Board or any agent or agency designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing.

gible employees.[5] Therefore, the appellant argues that the first election was valid, that it was improper for the Board to set aside the first election on the ground that the appellant did not comply with the *Excelsior* rule, and that it was error for the district court to enforce the Board-issued subpoena which was to be used in the allegedly improperly directed rerun election.

On the ground that it lacked jurisdiction to do so, the district court refused to review the action of the Board in setting aside the first election, see, *Boire* v. *Greyhound,* 376 U.S. 477 (1964). Assuming, though not deciding, that the district court did have jurisdiction to review that action of the Board, there surely was no compliance by the employer with the *Excelsior* rule. An employer-furnished list supplied the day before an election does not provide adequate time for fair scrutiny and appraisal. Even if Local 153 had timely obtained a list of employee names and addresses from sources other than appellant, such a list does not carry the same assurance of accuracy and completeness as a list obtained by an employer from the employment records. *Excelsior Underwear, Inc., supra.* Accuracy, completeness, and opportunity for scrutiny all are necessary if the policies underlying the *Excelsior* rule are to be fulfilled.

Ignoring the fact that the list appellant furnished, whether accurate or inaccurate, was not supplied within the seven day period required by the *Excelsior* rule, appellant argues that if there is any doubt as to the completeness and accuracy of the list of employees in the unions' possession the Board should have held an

[5] Apparently Local 153 sent out literature to employees in which it was stated that it had a list of names and addresses of the salesmen in all of the districts comprising the bargaining unit. This list was obtained, according to Local 153, from salesmen in the unit.

evidentiary hearing directed to such an inquiry before issuing an order for a rerun election. This argument is without merit. The *Excelsior* rule was designed to expedite representation elections. To force the Board to hold an evidentiary hearing each time an employer refused to supply an *Excelsior* list because the employer claimed that the union had obtained the necessary names from other sources would only impede the representation election process.

We hold that the district court committed no error in enforcing the Board-issued subpoena.

Affirmed.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRITISH AUTO PARTS, INC., APPELLANT

v.

NATIONAL LABOR RELATIONS BOARD, APPELLEE

No. 21,883

Appeal from the United States District Court for the Central District of California

TELEDYNE, INC., APPELLANT

v.

NATIONAL LABOR RELATIONS BOARD, APPELLEE

No. 22,354

Appeal from the United States District Court for the Northern District of California

(December 17, 1968)

Before JOHNSEN,* BROWNING and CARTER, *Circuit Judges.*

PER CURIAM. These two appeals are from orders of different district courts enforcing subpoenas against employers issued by the National Labor Relations Board

*Harvey M. Johnsen, Senior Circuit Judge of the Eighth Circuit, sitting by designation.

to provide the Board's Regional Office with the addresses (in addition to the names) of the employees eligible to vote in the representation elections which had been set for the respective plants. The basis for the demand was in both cases the holding and requirement of the Board's decision in *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966).

We can see no need to engage in further judicial discourse on the contentions made as to the unreasonableness and unfairness of an employer's being required to provide the addresses of his employees for use in a representation election, and further of his being thereby also forced to breach actual or presumable confidence in respect to employees' home privacy. These questions have had sufficient answer by decisions of two courts of appeal—with which we agree—*N.L.R.B.* v. *HAYNES HOSIERY DIVISION*, 384 F. 2d 188 (4 Cir. 1967), cert. denied 390 U.S. 950, 88 S. Ct 1041, 19 L. Ed. 2d 1141, and *N.L.R.B.* v. *ROHLEN*, 385 F. 2d 52 (7 Cir. 1967).

We accordingly merely note our approval of the findings and conclusions related to these contentions made by Judge Hill in the *British Auto Parts* case, 266 F. Supp. 368 (C.D. Cal.), and those made by Judge Weigel in the *Teledyne* case (N.D. Cal.), [not published in F. Supp.].

We further regard as not possessing merit the challenge made beyond this to the right of the Board to use its *Excelsior* decision as a basis for imposing such an address requirement in the situations. This attack is predicated on the holding in *Wyman-Gordon Co.* v. *N.L.R.B.*, 397 F. 2d 394 (1 Cir. 1968), with which we are unable to agree, rendered by a divided court since the time of the orders of the district courts herein.

In substance the position taken by the majority in *Wyman-Gordon* and by each of appellants here is that the address requirement of the *Excelsior* decision cannot be accorded the status of a decisional or adjudicative rule; that it was not made applicable to the parties involved or the disposition effected in that controversy; that it thus constituted merely a prescription for future election situations and so amounted only to the promulgation of a general administrative rule; that the Board however was not at liberty to adopt and place in effect such an administrative prescription except upon a compliance by it with the procedural specifications of 5 U.S.C.A. §§ 1002, 1003 (now §§ 552, 553) of the Administrative Procedure Act; and that the *Excelsior* rule could accordingly not be so utilized by the Board.

But the question whether an employer could at all or should be required to provide the addresses of his employees for purposes of a representation election was a salient issue in the *Excelsior* controversy. It was one upon which briefs were requested to be filed and oral argument was directed to be made before the Board. Thus it manifestly constituted a matter that the Board was entitled to consider, rule upon, and resolve in the *Excelsior* proceeding—which it did as follows: "We are persuaded * * * that prompt disclosure of the information here sought by the Petitioners should be required in all representation elections. Accordingly, we now establish a requirement that will be applied in all election cases. * * *". To us it seems clear that this constituted finding, conclusion and order resting on decisional element and incident in the controversy before it and so inherently represented adjudicative process and result.

While the Board engaged in spelling out the nature and significance of its holding and the details of the

practical operation thereof, such facilitating implementation would not in our opinion nullify the decisional or adjudicative character and basis of what it had done. It would be only natural that, with its heavy burden of work, the Board would seek to leave no possibility for claims of confusion and misunderstanding, or (to repeat the language which it used in relation to one of the details) "to insure that all parties to forthcoming representation elections are fully aware of their rights and obligations as here stated."

Further, we are not able to see how the fact that the Board chose not to make the decisional rule which it laid down controlling of its relief in the particular situation could alter the legal aspect or significance of its general adjudicative holding. We are not aware of any authority, other than the divisive holding in *Wyman-Gordon*, that a rule which has been laid down by an administrative tribunal on adjudicative element and process in a controversy before it is without force or effect as a decisional rule unless it is made to have application to the parties and to the relief of the immediate proceeding.

There remains the final contention that, even though the *Excelsior* rule be regarded as not invalid upon the foregoing bases, there exists no provision under either the National Labor Relations Act or the Judicial Code on which the Board can legally seek judicial enforcement of a subpoena issued in relation to it. As to this, we again agree with the holding of the Fourth Circuit in *Haynes Hosiery Division*, 385 F. 2d at 181, and that of the Seventh Circuit in *Kohlen*, 385 F. 2d at 57–58, as well as those of Judge Hill and Judge Weigel in the present cases, that such power and authority persuasively exist under the provisions of section 11(2) of the Act, 29 U.S.C. § 161(2).

The Board has been granted by that section the right to issue and have enforced subpoenas requiring persons "to produce evidence * * * or give testimony touching the matter under investigation or in question" before it. As held in *Rohlen,* 385 F. 2d at 57, a representation election inherently constitutes a "matter under investigation" from the filing of a petition or stipulation therefor, through the handling of all the incidents thereof, and until the termination of the proceedings. On this basis, the addresses as well as the names of employees could properly be found by the Board to be information which would be facilitative of both the process and the object of a representation election, and so subject to demand by it as "evidence" in a practical application of that term to the nature and aspects of such a proceeding.

With this holding, it is not necessary to consider whether jurisdiction to enforce the subpoenas involved would also coordinately or alternatively exist under the provisions of 28 U.S.C.A. § 1337 of the Judicial Code, conferring upon the district courts "original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce * * *". We accordingly do not reach that question and so of course intend no intimation of any nature upon it.

The order of enforcement in each of the cases before us is affirmed.[1]

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[1] It may be noted that the Supreme Court has recently granted the Board's petition for certiorari in the *Wyman-Gordon* case, so that that case is accordingly now pending before it.

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